United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2471

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AD-EXPRESS, INC; REX KITCHEN, as President of AD-EXPRESS, INC.; ANDREW GALLO Individually and as President of ANDY GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS VARIETY STORE; and PENNY WEBER,

Plaintiffs-Appellants,

—against—

JOHN F. KIRVIN, Supervisor of the Town of Rotterdam, New York; BENJAMIN WOLLNER, FRANCIS L. STONE, PETER LA MALFA, and WILLIAM OSTA, as members of the Town Board of the Town of Rotterdam, New York; EDWARD LONGO and JOHN LA MALFA, as Town Justices of the Town of Rotterdam, New York; and JOSEPH S. DOMINELLI, as Chief of Police of the Town of Rotterdam, New York,

Defendants-Appellees.

On Appeal From The United States District Court For The Northern District Of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

This appeal seeks review of an order of the United States District Court for the Northern District of New York, James T. Foley, District Judge, which order was issued and contained within the Court's memorandum decision of November 5, 1974 (A100*). Judgment on the order appealed from was entered on November 6, 1974 (A120).

The District Court's memorandum decision and order, not yet reported, held that local law No. 13**, passed by the Rotterdam, New York Town Board on August 21, 1974, and made effective as of September 10, (hereinafter "Rotterdam" and "Town Board") was not violative of the First or Fourteenth Amendments to the United States Constitution and therefore dismissed plaintiff's complaint upon the ground that it failed to state a substantial federal claim upon which relief could be granted.

ISSUES PRESENTED

Whether the District Court was correct in finding that plaintiffs-appellants' First Amendment rights of free speech are not violated by local law 13 and that, in any event, the

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* All references, unless otherwise indicated herein, are to the appendix filed herewith by appellants which, by agreement with counsel to appellees, contains all relevant portions of the record relied upon by all the parties to this appeal.

**Appended to the Complaint as Exhibit A but not reproducible because of illegibility. Therefore a legible transcript of the ordinance is attached as an addendum to this brief.

materials distributed by them are not entitled to any constitutional protection from governmental restraints as is admittedly imposed by the questioned ordinance.

Whether the District Court properly found that Rotterdam's local law 13 does not, prima facia, constitute unconstitutional governmental discrimination against the plaintiffs-appellants herein as well as unlawful restrictions upon a single classification of materials restricting their dissemination by plaintiffs-appellants to residents of Rotterdam in contravention of the equal protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This appeal represents an effort to have reviewed by this Court an ordinance passed by the Town Board of the Town of Rotterdam, New York (Schenectady County) on August 21, 1974, and referred to as local law No. 13 of 1974.

Local law 13 presumes to prohibit (a) the distribution of "advertising materials or samples" in "any kind of bag or bags" left hanging upon the premises of any home in the Town of Rotterdam and (b) the distribution of advertising material or samples "by placing such material at the home or on the property of" any person "owning or occupying such home ...." However, the ordinance also provides for the validation of this otherwise proscribed conduct by the process of obtaining "the [prior] written consent of the person occupying the home".

Moreover, the proscribed distribution of "advertising materials or samples" in any "kind of bag or bags" whether left hanging or otherwise deposited upon the premises of any home in the Town of Rotterdam is made specifically lawful if the same acts are committed by agents of the United States Postal Service, any newspaper of general circulation, and a charitable or non-profit organization. Violations of the local law are subject to $50 and $100 fines for the first and subsequent offenses respectively.

On September 12 and 16, 1974, two individuals delivering materials for Ad-Express were arrested by police officers in Rotterdam and charged with violations of local law 13 (A52; 98; 99; 95; 103). Thereafter, and on September 23, 1974 plaintiffs instituted this action seeking, inter alia, declaratory judgment as to the constitutionality of the ordinance under the First and Fourteenth Amendments to the United States Constitution. On the next day, September 24, 1974, plaintiffs proceeded by order to show cause for a temporary restraining order against the enforcement of local law 13, and a preliminary injunction pending a final determination. The District Court heard argument upon the application on October 7, 1974 and, while continuing the restraining order, issued its memorandum decision and order on November 5, 1974 holding that the ordinance did not suffer from

any constitutional infirmities and ordered plaintiffs' complaint dismissed for failure to state a substantial federal claim upon which relief could be granted. This appeal followed and, upon the District Court's refusal to extend its temporary restraining order pending appeal, this Court granted an injunction against enforcement of the ordinance pending the prosecution of this expedited appeal.

Plaintiffs-appellants herein are comprised of persons and/or entities engaged in the private business of distributing various advertising materials to the vast majority of private homes within the New York counties of Albany, Rensselaer, Schenectady and Saratoga. In particular, Ad-Express, Inc., (hereinafter "Ad-Express"*) may be said to be engaged in the business of a private postal service which, for a fee, distributes printed advertising matter to individual homes in the aforementioned counties wherein Rotterdam is located.(A49). Ad-Express' method of doing business consists primarily of providing this service for a wide variety of commercial enterprises, large and small, (A7,50,54; 82-84), by agreeing to distribute printed advertising matter or samples its clients wish to place before the

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* Includes all appellants for ease of reference and because their rights in the premises are inseparable.

consuming public. In addition, Ad-Express has and continues to distribute advertising material printed for or by religious organizations, public officials, educational institutions and charitable organizations soliciting memberships, funds or public support. (A52-4; 60-73; 88).

In return for payment Ad-Express undertakes to regularly distribute these various printed materials on a scheduled basis to defined marketing areas on a saturation basis (A50-51). The saturation referring merely to the fact that the material is left at the premises of as many homes as possible within each locale in order to achieve maximum exposure which is the objective of the businesses or other organizations paying Ad-Express for its service (A50-51).

The materials distributed by Ad-Express are generally delivered by individuals, principally housewives (A51; 56; 85-87) who contract with Ad-Express to perform this service along designated routes within specific market areas on one or more days in each week (A8; 51; 85-87). Deliveries of this advertising material are made by placing the printed circulars in small plastic bags which are hung from the door knob of each home within a route or by lightly fastening the bag containing the circulars to individual mail boxes. (A8-9). No individual homeowner or resident is specifically requested to accept any of the distributed

material nor is a resident otherwise disturbed upon delivery. However, deliveries at any location may be suspended upon the simple request of an occupant (A9; 56). Upon making such a request, deliveries are promptly stopped and the resident is requested to indicate upon a short simple form his or her reasons for the request (A9; 56). The purpose for seeking the resident's reasons for discontinuing the services is a valuable measure in assessing the merits of this means of advertising and is merely a tool used in evaluating the efficiency of the program and possible ways to improve it.

The individual appellants herein, whose rights are inseparable from those of Ad-Express, consist of the president of Ad-Express (A5-6; 49), an individual doing business as a small retailer who has engaged the services of Ad-Express (A82) and a housewife who is a contract deliverer of the packaged materials (A85). Each of these individuals is rendered subject to the fines contained within local law 13 should they distribute or deliver the materials contained within the plastic bags employed by Ad-express in its business.

Local law 13 however, is devoid of any declaration of legislative intent with respect to the events or harms perceived

and sought to be avoided or protected against by the passage of this legislation. Unfortunately, this Court, as was the District Court below, is left solely to extrapolating from the ordinance's proscriptive language the reasons for the prohibitions against, and the harm detected from, the activities rendered unlawful. The only extrinsic evidence of legislative intent, albeit irrelevant in fact and in form, is the affidavit of John F. Kirvin dated October 4, 1974 submitted in opposition to Ad-Express' motion for a preliminary injunction before the District Court (A91-94). In his affidavit Mr. Kirvin states that he is the Supervisor of the Town of Rotterdam (A91), and presumably a member of the Town Board although he does not so allege.

Mr. Kirvin asserts that local law #13 was adopted by the Town Board in the exercise of its police power and for the following reasons: (1) to prevent the accumulation of advertising materials on the porches or in the front of the homes at times when the residents thereof are away thus eliminating a potential hazard to the security of the home "to the extent that such accumulations are public notice to potential intruders and burglars that the house is unoccupied"; and (2) "the nuisance attendant to the retriving [sic] of these advertising materials by the resident and their disposition"; and finally (3) the "potential safety hazard of the plastic distribution bags in

the hands of small children" (A92). Mr. Kirvin asserts that protection from the foregoing horrors arising from advertising contained within bags is "in the best interest of the welfare of the residents of the town ...". (A92).

Offered in further support of local law 13 are the innuendos contained in the Kirvin affidavit wherein he states that insofar as "the balancing of hardship" is concerned, Ad-Express has "perhaps a dimunition of profits" at stake (A93), while Rotterdam will suffer "the continued distribution of the advertising materials [which] constitutes a continuing nuisance to those Rotterdam residents who do not want to be bothered with them, and now importantly remains a potential hazard to both home and children." (A93-94). Kirvin then rounds out his argument of fear, lacking completely in record support, by stating that "[a]ccidents or crimes are, of course, not predictable. But it indeed would be tragic if only one family suffered a personal loss resulting from the continued operation of Ad-Express in Rotterdam". (A94). On that note of impending speculative disaster, to be caused by Ad-Express, the Town rests its support for this malignant ordinance.

As is stated above, the record herein contains no support whatsoever for the asserted legislative intent behind

this ordinance and likewise lacks in any evidence which might give credence to the existence of the harm to residents sought to be avoided by this enactment. Indeed, it was commonly accepted, and the record shows, that the ordinance was passed at the urging - if not insistence - of the local postal union and newspaper (A58; 74; 80) who may fear, respectively a loss of second and third class mail and advertising sales. Although these fears may be justified, because of the competitive costs savings when using the services of Ad-Express and its reliability, business apprehension cannot sustain this ordinance. Measured against the Town's lack of record facts to support its ordinance is the uncontroverted record showing made by Ad-Express that the conduct of its business is not responsible for the imagined harms advanced by the Town nor is it likely to lead to such events.

The Town claims that "bags", such as used by Ad-Express, are forbidden by the ordinance to prevent harm to children (A92). The harm is unspecified but presumably refers to the potential asphyxiation of a youngster who should place a bag over his head. Notwithstanding the constitutional infirmity of such a generic ban upon a product not inherently dangerous, the fact is that the bags employed by Ad-Express in its business are too small to fit over the head of even a three year old child (A57-58). Moreover, the Town has made no showing that, when this ordinance was passed, it had before it evidence of such events sufficient to warrant the proscription of "bags" when bags are not inherently dangerous

and are in common usage* throughout the retail industry.

The Town's assertion that the service provided by Ad-Express is a "nuisance to ... residents who do not want" the materials (A94) is neither supported by this record nor does the apprehended nuisance constitutionally justify the blanket ban on bags and advertising as enacted. Indeed, the only evidence in this record concerning resident reaction to Ad-Express, both favorable and unfavorable was provided by Ad-Express. Of the thousands of homes in Rotterdam to which the advertising matter is delivered only 88 persons have requested discontinuance (A56), while about 800 resident homeowners signed a petition opposing the ordinance enacted (A58).

Based upon the record here revealed, it is entirely credible that Rotterdam's local law 13 was enacted solely to prohibit the business conducted by Ad-Express (A92;94**). It cannot be gainsaid that the ordinance's application to Ad-Express is merely incidental to the Town's apprehension of the general

* It is common knowledge that in the dry cleaning industry large plastic bags are used almost exclusively and are usually carefully discarded to avoid their employ by any children. Surely the Town of Rotterdam is not proposing that it may forbid the use of such materials widely employed in commerce. Aside from the constitutional objections made here is the self-evident constitutional limitation contained in Article 1, Section 8, Clause 3, of the United States Constitution reserving to Congress the power to regulate "Commerce ... among the ... States".

**References being made to "plastic distribution bags" and "the continued operation of Ad-Express in Rotterdam".

conduct of the advertising businesses in Rotterdam. The ordinance prohibits doing business in the very particular manner conducted by Ad-Express and was prompted by Ad-Express' success with the residents of that community to the commerical detriment of competing forms of advertising. In fact, two Ad-Express delivery persons have been arrested and charged with violations of local law 13 (A98-99) and a third has been harassed by postal service employees (A86) while performing their duties.

Should any doubt remain that Ad-Express was the target of local law 13 one need only review Section 2 thereof to see that a blanket exception from the ordinance's proscriptions is bestowed upon the postal service, newspapers of general circulation and to charitable or non-profit organizations. One might argue that, given these uncontested facts, the ordinance, were it considered to impose a criminal penalty, has every analgous feature of the ancient, abhorent and unconstitutional bill of attainder. Thus, while the Town argues that the evils visited upon its residents (i.e., litter; nuisance; injury to children; accumulation of material upon the premises of a temporarily vacant home resulting in burglary invitations) are obviated by this ordinance insofar as its reach prevents Ad-Express from doing business in Rotterdam, the Town finds however that those identical conditions, if caused by the mailman, newspapers or eleemosynary

institutions, are sufferable. Advertising and samples or bags containing advertising material or samples may be hung, thrown or deposited upon residential premises in Rotterdam but only by those enterprises excluded from the ordinance's ambit; the classification made by the Town invites scrutiny and compels rejection.

Finally, the record also reflects that the ordinance contains no description of advertising material and by definition* would include all materials distributed by Ad-Express whether of a commercial nature or for charity. Clearly the informational or solicitation brochures distributed by Ad-Express (often for only a minimal charge) for various charitable or not-for-profit organizations and office seekers (A60-70) is included within the term "advertising material". Such distributions have been made for: a family "Y" organization (A60); the State University of New York at Albany (A53); a county legislator (A72); Big Brothers of Albany (A62; 88) and many others.

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*See, Black's Law Dictionary (4th Ed., 1951) p. 74.

ARGUMENT

I

ROTTERDAM'S LOCAL LAW 13 IS UNCONSTITUTIONAL ON ITS FACE AS AN INVALID STATUTORY RESTRICTION OF FREE SPEECH GUARANTEED TO PLAINTIFFS-APPELLANTS BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The District Court held that the case of Breard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920 (1951) was controlling in this instance, and compelled it to hold that local law 13 does not impinge upon appellants' rights of free speech. It is submitted that Breard does not, even remotely, provide any basis for upholding the constitutionality of this ordinance.

In Breard, appellant was a door-to-door salesman who actually "rang the bell" of each household and engaged the resident in conversation soliciting magazine subscriptions. The ordinance there in question rendered such solicitation unlawful if done without the prior consent of the homeowners. The Supreme Court upheld the ordinance's validity against charges that it violated the Due Process and Commerce Clauses and free speech guarantees. However, the ordinance evaluated in Breard, properly classed as a progeny of the "Green River Ordinance",* was specifically characterized by the Supreme

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*See, Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933).

Court,

> "...as prohibitory of appellant's legitimate business of obtaining subscriptions to periodicals only in the limited sense of forbidding solicitation of subscriptions by house-to-house canvass without invitation." (341 U.S. at 631; 71 S. Ct. at 927).

Despite this express limitation of the Breard holding the District Court here declared:

> "The holding in Breard is cast in terms of a generic ordinance requiring consent before the privacy and integrity of an abode is transgressed". (A109)

It is here strongly asserted that the holding in Breard is not so cast. Clearly, the Supreme Court's decision in Breard was based upon the fact that the solicitation there was door-to-door and residents were called to respond immediately to an offer of a magazine sale. The intrusion upon the privacy of a home was unquestioned. The fact that the Breard ordinance also provided that such solicitation was lawful if done with prior consent of the homeowner played no part in the Supreme Court's opinion.

Notwithstanding this clear import of Breard, the District Court here based its entire reliance on that decision upon its conclusion that,

> "The ordinance at issue in Breard contained the same generic requirement that solicitors obtain prior consent of the occupants of private residences before attempting to transact business with them." (A100).

The District Court here chose to view the similarities between

the Breard and Rotterdam ordinances rather than the differences in the acts prohibited and in the manner of doing business between Breard and Ad-Express.

In Breard the salesman knocked on the door of each home, and made his sales pitch; Ad-Express at no time disturbs any resident when making its deliveries of advertising material. Moreover, vis-a-vis each homeowner, Ad-Express sells them nothing. The District Court dismisses the factual difference between Breard and Ad-Express in the following language:

> "While I recognize that in the Ad-Express business advertising is left on the residence rather than verbal solicitation, yet there is no constitutional distinction to be made here since both intrude upon the tranquility of the home." (A111).

Thus, in defense of tranquility, (a ground not asserted by the Town) the District Court brushes aside the differences in the ordinances and the facts respecting the actual conduct of Ad-Express in order to find the Breard ruling applicable here.

Significantly however, the Supreme Court in Breard found this distinction in conduct very important as respects the Due Process Clause of the Fourteenth Amendment, stating:

> "The question of a man's right to carry on with propriety a standard method of selling is presented here in its most appealing form -- an assertion by a door-to-door solicitor that the Due Process Clause of the Fourteenth Amendment does not permit a state or its subdivisions to deprive a specialist in door-to-door selling of his means of livelihood. But putting aside the argument that after all it is the commerce, i.e., sales of periodicals, and not the methods, that is petitioner's business, we think that even a legitimate occupation may be restricted or prohibited in

> the public interest. ... The problem is legislative action. We hold that this ordinance is not invalid under the Due Process Clause of the Fourteenth Amendment." (341 U.S. at 632-33; 71 S. Ct. at 927) (Citations and footnotes omitted; emphasis added).

Unlike Breard, at issue here is Ad-Express' method of doing business which is prohibited under local law 13. The District Court's finding of generic similarity between the Breard and Rotterdam ordinances respecting prior consent is largely irrelevant because such analsysis fails to consider the acts which are being statutorily regulated. It was the act of going door-to-door and rousting the residents which the Supreme Court in Breard found were constitutionally permissible of regulation; it was not the consent provision of the ordinance which rendered it valid. From this prospective it is readily seen that Breard cannot stand for the propositions cited below by the District Court.

Ad-Express asserts its free speech guarantees arising out of the fact that it distributes written and pictorial advertising matter, commercial and non-commercial in nature, for all manner of businesses, charities and other organizations and such writings are afforded free speech protection. Cammarano v. U.S., 358 U.S. 498, 79 S. Ct. 524 (1959; see concurring opinion, Mr. Justice Douglas), Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D, D.C. 1971; see dissenting opinion, Skelly, J.)

aff'd., 405 U.S. 1000, 92 S. Ct. 1289 (1972); Schneider v. State of New Jersey, 308 U.S. 147, 60 S. Ct. 146 (1939); Lovell v. City of Griffin, Ga., 303 U.S. 444, 58 S. Ct. 666 (1938); Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646 (1972). In rejecting this position the District cites exclusively to a 1939 California District Court case, Buxbom v. City of Riverside, 29 F.Supp. 3 (S.D. Calif. 1939).

In Buxbom, the appellant had been charged with violating a local ordinance arising out of "throwing certain advertising literature on the grounds of a private residence ... without first obtaining the permission of the owner." Id. at 6. While finding that free press is part of free speech, the Court in Buxbom holds:

> "The right to speak freely does not imply the right to force one's speech on another's private premises." (Id. at 6; emphasis in original)

It is suggested that the judicial interpretations of free speech since Buxbom in 1939 have rendered the analysis therein made of no precedential value in this case* even if Buxbom was correctly

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*Buxbom has not been cited, to appellants' knowledge, for its holding on the issue of free speech, in any subsequent federal case except in Chrestensen v. Valentine, 122 F.2d 511 at 516 (2nd Cir. 1941) rev'd. 316 U.S. 52 (1942). Even in this instance this Court cited Buxbom for the proposition that "an absolute prohibition against casting matter into the street is seemingly valid ..." 122 F.2d at 516. Buxbom has only been cited for the proposition that "courts cannot enjoin a valid prosecution merely because others guilty of the same offense are not being prosecuted." 29 F.Supp. at 8; Washington v. United States, 401 F.2d 915 at 924, n.55 (C.A.D.C. 1968); Moss v. Horning, 214 F.Supp. 324 at 331 (D. Conn. 1962).

decided at the time. Measured against Buxbom, where the activity ruled illegal was the throwing of advertising literature on the ground, are more recent cases holding similar activities lawful and not constitutionally prohibitable. Toms River Publishing Co. v. Borough of Brielle, ____ F.Supp. ____, (D.N.J., March 15, 1974) (A39-48).

In Toms River the ordinance, there considered unconstitutional on First Amendment grounds of free speech, prohibited distribution of all written matter without an owner's express consent. The reasons advanced in support of the Toms River ordinance were the same as those urged by Rotterdam here (A40-41).* Relying upon Lovell v. City of Griffin, 303 U.S. 444 (1938), Branzburg v. Hayes, 408 U.S. 665 (1972), McLaughlin v. Florida, 379 U.S. 184 (1964), Schneider v. New Jersey, 308 U.S. 147 (1939) and Breard v. Alexandria, supra, the Court in Toms River held:

> "The impact on First Amendment rights caused by the overbreadth of this Ordinance is unnecessary. A more narrowly drawn alternative enactment could accomplish the same result as Ordinance No. 446 -- preventing the accumulation of unsolicited literature on unoccupied premises -- without the adverse effect on protected rights caused by Ordinance No. 446." (A46)

On the question of "balancing of hardship" (A93), as argued by

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*Significantly, an additional ground (right to privacy) was presented to the Court in Toms River as reason for that ordinance which ground the Court found absent "from the preamble to the Ordinance" (A42). As heretofore shown, Rotterdam''s ordinance has no preamble and no legislatively stated purpose.

Rotterdam, the District Court here upheld the ordinance without benefit of stated legislative intent; the Toms River Court rejected that ordinance upon reviewing the statute's stated purpose.

It is suggested that upon enactment of any statutory scheme, such as the Rotterdam ordinance here on review, which declares illegal otherwise harmless conduct, it ill serves both the regulated and the regulator to leave legislative purpose to hindsight; or to permit its assertion by a single legislator such as Mr. Kirvin (A92) who, as a single member of the legislature has no more standing to independently assert a legislative purpose than any other member of the Rotterdam Town Board. And, in any event, Mr. Kirvin can hardly be considered to speak for the official body when it comes to certifying legislative intent -- such intent, when expressed in an ordinance, is the result of a vote and provides the courts and citizen alike a standard against which to measure conduct and constitutionality. The Kirvin affidavit hardly amounts to stated legislative purpose; these are Mr. Kirvin's views only.

It is for this Court to again establish that free speech cannot be abridged in the name of some apprehended fear of litter, Lovell, supra, and supposed harm from burglaries or fantasied injury to children by a product not shown to be harmful. This record does not support the Rotterdam ordinance in the face of the constitutional guarantees asserted. The fact that Ad-Express asserts these rights as a commerical entity does not make these guarantees disappear. As the Court in Breard noted:

> "We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature." 341 U.S. at 642; 71 S. Ct. at 932 (footnotes omitted).

Indeed, even in Breard, where the door-to-door magazine solicitation ban was upheld, the Court appeared very concerned about distinguishing fairly its prior holding in Martin v. Struthers, 319 U.S. 141, 63 S. Ct. 862 (1943). In Martin the door-to-door solicitation was for the purpose of distributing advertising for a religious meeting and the ordinance forbade any door-to-door advertising. The Martin Court found the ban there too pervasive in that "it substitute[d] the judgment of the community for the judgment of the individual householder." 319 U.S. at 144, 63 S. Ct. at 863.

Thus the Supreme Court, in the venerable name of free speech, has upheld a ban on door-to-door soliciation when selling magazines, Breard, supra, but found a similar ban unconstitutional when applied to the distribution of regligious advertising, Martin, supra. In the first instance the privacy of the home reigned supreme as compared to commercial soliciation, in the second it did not as compared to religious solicitation.

Ad-Express does not solicit in the home but does distribute advertising of a commercial, religious and charitable nature. It simply cannot be, as the District Court below held, that "...the control of such business is not within the ambit of the Constitution." (A109).

The District Court committed clear error in its application of Constitutional principles to Ad-Express when it held the Rotterdam ordinance valid thus effectively putting Ad-express out of business in that community (A51-52; 83). The District Court's error is nowhere more apparent than in its conclusion that:

> "There is no question that plaintiffs here distribute primarily advertising material which is entitled to no constitutional protection from governmental restraints such as the instant ordinance." (A115).

As was stated in Lovell, supra, "[t]he liberty of the press is not confined to newspapers and periodicals ... the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 303 U.S. at 452, 58 S. Ct. at 669. This principal has been reaffirmed as recently as 1972 in Branzburg, supra, at 408 U.S. page 704, 92 S. Ct. page 2668. However, Ad-Express is not here asserting any absolute rights concerning the conduct of its affairs as it subscribes to the directional advice rendered by the Supreme Court in Schneider,

supra, wherein the Court stated:

> "We are not to be taken as holding that commercial soliciting and cancassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty." (308 U.S. at 165; 60 S. Ct. at 152)

In passing this ordinance Rotterdam has placed the "cart before the horse", so to speak, insofar as it has banned all advertising or advertising in bags,* placed upon private premises without the prior consent of the owner or occupant. Given the fact that each of the recipients of the Ad-Express materials may, and have, easily removed themselves from the distribution list, the Rotterdam ban objectively precludes the Town's residents from concluding for themselves whether they wish to continue receiving this material.** The situation created by Rotterdam is the obverse of that upheld in Rowan v. U.S. Post Office Dept., 397 U.S. 728, 90 S. Ct. 1484 (1970).

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* Except if done by newspapers, charitable or non-profit organizations or the U. S. Postal Service, see Point II infra.

** 800 of them presumably wish to continue receiving the materials if their signatures upon the petiton opposing this ordinance may be considered to so indicate (A58).

The Supreme Court in Rowan upheld the procedure provided for in a federal statute wherein the recipient of "advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provacative' ..." (397 U.S. at 730, 90 S. Ct. at 1487) could "require that a mailer remove his name from its mailing lists and stop all future mailings to the householder." 397 U.S. at 729, 90 S. Ct. at 1486. In holding the statute's objective as constitutionally permissible the Court also found that the means adopted to achieve that object did not violate any free speech rights of the publishers of the offensive materials. Specifically the Court declared:

> "Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.
>
> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. See Martin v. Struthers, supra; cf. Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369, appeal dismissed, 335 U.S. 875, 69 S.Ct. 240, 93 L.Ed. 418 (1948). In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer."

* * *

"In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents -- or indeed the text of the language touting the merchandise. Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.

In effect, Congress has erected a wall -- or more accurately permits a citizen to erect a wall -- that no advertiser may penetrate without his acquiescence."

* * *

"The appellants are not prohibited from using, selling, or exchanging their mailing lists; they are simply required to delete the the names of the complaining addressees from the lists and cease all mailings to those persons."

(397 U.S. at 736 - 740; 90 S. Ct. at 1490-1492).

The Constitutional guarantee of free speech attaching to free press is a living principle not tied to the individual determinations made, from time to time, on its application. Today's case merits today's review of what free speech is and how it should apply to a new factual presentation. On that basis, and considering the prior decisions above set forth, this Court is urged to declare Rotterdam's local law 13 unconstitutional as in violation of appellants' First Amendment rights of free speech.

II

THE LOCAL LAW'S SPECIFIC EXEMPTIONS FROM ITS PROHIBITIONS, GRANTED TO APPELLANTS' COMPETITORS AND OTHERS, DESTROYS ITS PURPORTED FOUNDATION AND UNCONSTITUTIONALLY DISCRIMINATES AGAINST APPELLANTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Section 2 of local law provides:

> "The foregoing provision shall not apply to the distribution of advertising materials through the U.S. Postal Services. The provision of this ordinance shall not apply to the distribution of any newspaper of general circulation nor to materials distributed by charitable or non-profit organizations.

Thus, on its face, the ordinance would permit the distribution of advertising in bags, or any advertising, left or hung upon a resident's premsies if done by the Postal Service, any newspaper of general circulation (even this description appears suspect in the view of free press pronouncements, see Point I, supra) or a religious or non-profit organization, while denying the same privilege to Ad-Express. If invidious statutory classifications remain constitutionally repugnant under the Equal Protection Clause then this ordinance is a classic example thereof.

The District Court below made short shrift of Ad-Express' equal protection argument as respects this ordinance. In less than three pages of its 15 page opinion (A113-115) the District Court holds the local law beyond reproach insofar as the Fourteenth

Amendment is concerned. Relying principally upon Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970), Valentine v. Chrestensen, 316 U.S. 52 (1942) and Buxbom v. City of Riverside, 29 F.Supp. 3 (S.D. Calif. 1939) the Court held:

> "In terms of the exemption for newspapers of general circulation, the Town of Rotterdam may make reasonable classifications of materials delivered. The federal courts have traditionally drawn a distinction between primarily advertising materials and the communication of ideas as in the case of a newspaper. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 201 (1973) (Brennan, J. dissenting); Valentine v. Chrestensen, supra. There is no question that plaintiffs here distribute primarily advertising material which is entitled to no constituional protection from governmental restraints such as the instant ordinance.
>
> Therefore, in my judgment, the equal protection challenge also fails to state a substantial federal question. Buxbom v. City of Riverside, supra, 29 F. Supp. at 8." (A115)

It is noteworthy that the District Court should rely upon Rowan as supportive of its decision here. As previously noted, pp. 23-24, supra, Rowan is the reverse situation from that presented here. The Rowan decision upheld federal legislation providing a means whereby a mail recipient could demand to be removed from the mailing list of a publisher or distributor of sexually offensive material. In this instance Rotterdam has

denied Ad-Express any right to distribute its materials* thus preventing the residents of Rotterdam from making the type of judgment reserved to the recipients by the federal regulation approved in Rowan. The instant case truly presents the situation where the local government presumes to pre-judge the merit of printed matter and substitute its judgment for that of the community. As was stated in Martin v. Struthers, supra, albeit in the context of distributing door-to-door literature espousing a religious cause:

> "The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It subjects the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it. In considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and * * * appraise the substantiality of the reasons advanced in support of the regulation.' Schneider v. State, supra, 308 U.S. 161, 60 S.Ct. 151, 84 L.Ed. 155". (319 U.S. at 143-144; 63 S. Ct. at 863-864).

Rowan thus stands for an obviously laudable principle that "a vendor [does not have] a right under the Constitution ... to send unwanted material into the homes of another ..." if the homeowner does not want it. 397 U.S. at 738, 90 S.Ct. at 1491. Rowan does not stand for the obviously unconstitutional theory

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* No claim of obscenity is being made here however.

that governments may selectively ban certain types of harmless writings from public distribution permitting no judgment by the intended recipient who may want it. Moreover, neither Rowan nor any other case known to appellants stands for the proposition endorsed here: that a local town board may ban written material if distributed by a certain entity like Ad-Express, but fully legitimize the same distribution if done by another business or organization; constitutional infirmity would appear obvious particularly when, as here, Ad-Express' distribution is being forbidden, while its competitors are being allowed to continue with the proscribed practices.

Somehow it seems out of place that, in 1974, governments at all levels still need reminding that when prohibitory legislation is being drafted, involving the limitation upon the conduct of persons, that standards of equal protection -- at a minimum -- compel equal treatment of all persons unless some imperative state purpose is legitimately served by an unequal treatment. This case does not encompass such an imperative purpose legitimizing the exceptions contained in Section 2 of local law 13. Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286 (1972), U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S. Ct. 2821 (1973), McGowan v. State of Maryland, 366 U.S. 420, 81 S. Ct 1101 (1961), Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251 (1971), Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254 (1971), Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972).

Upon review of the authoritative cases on the subject of equal protection, too numerous to name but a few, local law 13 cannot withstand scrutiny. Pertinent to this inquiry is the following question: assuming arguendo a validly stated purpose, how did the Rotterdam Town Board protect its citizens against litter, burglarly, injury to children or any other harm foreseen when it banned distribution of advertising or advertising in bags anywhere in Rotterdam except if committed by newspapers, charitable or non-profit organizations or the U.S. Postal Service? The answer to the question is self-evident -- Rotterdam has only managed to zero in on Ad-Express leaving the litter, the burglary invitations, the harm to children to be caused by the statutorily privileged. The classification is patently offensive to the Equal Protection Clause of the Fourteenth Amendment.

As often as the principle has been enunciated it apparently bears repeating, that:

> "A classification 'must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly

> circumstanced shall be treated alike'", Reed v. Reed, 404 U.S. at 76, 92 S. Ct. at 254.

Possibly because it could not do so, the District Court here did not attempt to rationalize away the favored treatment accorded newspapers and charities in local law 13. It is unequivocally asserted that no "state of facts reasonably may be conceived to justify ..." the exclusions contained in this ordinance favoring Ad-Express' competition including charities. McGowan v. State of Maryland, 366 U.S. at 426, 81 S. Ct. at 1105. cf. Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153 (1970) and Valentine v. Chrestensen, 316 U.S. 52, 62 S. Ct. 920, cannot seriously be postulated as supportive of the decision below. The central issue in Valentine was stated and decided as follows:

> "The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or intereference with, the full and free use of the highways by the people in fulfillment of the public use to which the streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct." (316 U.S. at 54-55; 62 S. Ct. at 921)

No doubt the District Court here felt hampered in evaluating Rotterdam's local law 13 in the same fashion that the Supreme Court expressed in U. S. Dept. of Agriculture v. Moreno, wherein it

stated: "Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment ..." to the federal legislation then under attack on equal protection grounds. 413 U.S. at 530, 93 S. Ct. at 2825.

Given the fact that, except for Ad-Express, all others who might engage in the activity declared illegal by local law 13 are exempted from its coverage, the further comment in U. S. Dept. of Agriculture v. Moreno, supra, is singularly apt here:

> "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (413 U.S. at 531, 93 S. Ct. at 2826; emphasis in original)

No amount of afterthought of the type offered by the Town here can give retroactive validity to local law 13 in the full view of daylight and the plain wording of the ordinance. By way of evidence tending to establish that the activity prohibited will or could be prevented by the restrictions imposed -- that record is not here; if a record exists supporting the exclusion of newspapers and charities or the Postal Service from the prohibitions in the ordinance, that record is similarly not presented here. The invidious discrimination practiced by the

ordinance is manifest, and the record renders inescapable the conclusion that Rotterdam's local law 13 violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, plaintiffs-appellants respectfully urge that local law 13 of Rotterdam, New York be declared invalid under the First and Fourteenth Amendments to the united States Constitution.

Respectfully sumitted,

Gerard A. Dupuis
Miller & Summit
90 Broad Street
New York, New York 10005

November 26, 1974

ADDENDUM

LOCAL LAW #13

(1974)

BE IT ENACTED by the Town Board of the Town of Rotterdam, Local Law No. 13 for the year 1974 as follows:

SECTION 1. It shall be unlawful for any person to leave hanging any kind of bag or bags containing advertising materials or samples, or to distribute advertising material or samples at a home located within the Town of Rotterdam, New York, other than the home of the person soliciting the same, by placing such material at the home or on the property of the person owning or occupying such home, unless the person distributing such advertising material or samples obtains the written consent of person occupying the home.

SECTION 2. The foregoing provision shall not apply to the distribution of advertising materials through the U.S. Postal Services. The provision of this ordinance shall not apply to the distribution of any newspaper of general circulation nor to materials distributed by charitable or non-profit organizations.

SECTION 3. Violation of this Local Law shall be deemed an offense and all persons, including corporations, found in violation shall be subject to a fine of $50.00 for the first offense and a $100.00 fine for each subsequent offense.

SECTION 4. This local Law shall take effect on the 10th day of September, 1974, provided copies thereof shall have been filed with the Secretary of State and the State Comptroller as provided by the Municipal Home Rule Law.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AD-EXPRESS, INC: REX KITCHEN, as President of AD-EXPRESS, INC.; ANDREW GALLO Individually and as President of ANDY GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS VARIETY STORE; and PENNY WEBER,

Plaintiffs-Appellants,

—against—

JOHN F. KIRVIN, Supervisor of the Town of Rotterdam, New York; BENJAMIN WOLLNER, FRANCIS L. STONE, PETER LA MALFA, and WILLIAM OSTA, as members of the Town Board of the Town of Rotterdam, New York; EDWARD LONGO and JOHN LA MALFA, as Town Justices of the Town of Rotterdam, New York; and JOSEPH S. DOMINELLI, as Chief o Police of the Town of Rotterdam, New York,

Defendants-Appellees.

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Robert McElroy , being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 32 Gramercy Park South , in the Borough of Manhattan , City of New York. On the 26th day of November, 1974 , at 3:15 o'clock pm ,

I served 2 copies of the Brief and 1 copy of the Appendix

in the above-entitled action on:

Michael Volpe, Esq.
Rotterdam Town Hall
Vinewood Avenue
Rotterdam, New York

the attorney for the Defendants-Appelles

in the said action, by depositing said copies, securely wrapped properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Robert McCoy

Sworn to before me this
[illegible] day of [illegible], 19[illegible]

Michael J Hoops

MICHAEL J HOOPS
Notary Public, State of New York
No. 30-4603056
Qualified in Nassau County
Commission Expires March 30